91-686

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

State of Georgia, Petitioner

v.

Johnny Allen Ashley, Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

Harry N. Gordon
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Western Judicial Circuit
325 East Washington Street
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Athens, Georgia 30601
(404) 354-2820
Counsel of Record for Petitioner

QUESTIONS PRESENTED

I. IF A PERSON INVOKES HIS RIGHT TO COUNSEL DURING INTERROGATION BUT IMMEDIATELY THEREAFTER INITIATES PERTINENT DIALOGUE WITH INVESTIGATING OFFICERS, IS THE RESULTING INTERVIEW ILLEGAL BY VIRTUE OF A SUBJECTIVE INTENT ON THE PART OF THE OFFICER TO RE-INTERROGATE, WHERE THE OFFICER DOES NOTHING MORE TO ACCOMPLISH THE INTENDED RE-INTERROGATION THAN TO ENTER THE ROOM WHERE THE PRISONER IS LOCATED?

II. IS HEARSAY TESTIMONY ADMISSIBLE AT A PRE-TRIAL HEARING ON A MOTION TO SUPPRESS CUSTODIAL STATEMENTS, ON THE ISSUE OF WHETHER OR NOT AN INVESTIGATING OFFICER HAD BEEN SUMMONED TO SPEAK WITH A PRISONER AT THE PRISONER'S REQUEST?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Supreme Court of Georgia in Ashley v. The State [of Georgia], reversing the ruling of the trial court that certain custodial statements are admissible, is reported at ____ Ga. ____, 405 S.E.2d 657 (1991), and is printed in Petitioner's Appendix (App.1), infra. The order of the Supreme Court of Georgia denying the Motion for Reconsideration of the State of Georgia is unreported and is printed in Petitioner's Appendix (App. 21), infra. The order of the Superior Court of Clarke County denying the motion of Johnny Allen Ashley to suppress his custodial statements is unreported and is printed in Petitioner's Appendix (App. 11), infra.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on July 3, 1991. A timely-filed Motion for Reconsideration was denied by the Supreme Court of Georgia on July 24, 1991. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The issue in this case is controlled by the Fifth Amendment to the Constitution of the United States which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

> or in the Militia, when in actual service in time of War or public danger; nor shall any person by subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment prohibition against compulsory self-incrimination and the prophylactic rules of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), and Edwards v. Arizona, 451 U.S. 477, 101

S.Ct. 1880 (1981), provide the constitutional subject matter of this Petition.

STATEMENT OF THE CASE

Johnny Allen Ashley is charged with a murder and armed robbery which occurred in Clarke County, Georgia, on May 5, 1989. Pre-trial hearings were conducted to determine the admissibility of certain custodial statements as required by Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964). On November 30, 1990, the trial court entered an order, including specific findings of fact, admitting the custodial statements. (App. 11-20). Ashley entered a plea of guilty to murder with leave to appeal the admissibility of his custodial statements to the Supreme Court of Georgia. On July 3, 1991, the Supreme Court of Georgia reversed the

ruling of the trial court, finding that the custodial statements were obtained in violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), and Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404 (1986). The Motion for Reconsideration filed by the State of Georgia was denied on July 24, 1991. The following are the facts relevant to this Petition:

Johnny Allen Ashley was arrested for drug offenses by Barrow County, Georgia, sheriff's deputies on May 8, 1989. That same evening, Ashley was transported to Clarke County, Georgia, for questioning in connection with a murder and armed robbery which had occurred in Clarke County on May 5, 1989. Ashley was advised of his Miranda rights, questioned, and then returned to Barrow County. (App. 11-12).

The evening of May 9, 1989, Clarke County police officers returned to Barrow

County to obtain and execute a search warrant for a sample of Ashley's hair and blood. Ashley was advised of his Miranda rights again, and after a short interview, Ashley requested the assistance of counsel. At this point the Clarke County police ceased all questioning and left the Barrow County jail. (App. 12).

After the Clarke County officers had left the Barrow County jail, Barrow County deputy Bob Kenney returned to the interview room where Ashley was located to discuss the Barrow County drug charges with him. Before Deputy Kenney could commence any questioning, however, Ashley began questioning Deputy Kenney about his pending charges. In his own sworn testimony at the Jackson v. Denno hearing, Ashley gave this account of what transpired:

Q: When Bob Kinney [sic] came back in the room the first thing you said is what am I charged with?

A: Well, yes sir, that is the first thing I said, yes sir.

Q: Well, Bob Kinney didn't even get a chance to ask you any questions before you asked questions:

A: No sir, he sure didn't.

Q: Sir?

A: I said no sir, he sure didn't.

Q: You started the conversation when Bob Kinney walked back in the room?

A: I ask him what I was charged with.

(App. 16-17). Thereafter followed a generalized discussion of Ashley's

situation culminating in Ashley posing to deputy Kenney a "hypothetical" question concerning Ashley's possible knowledge about the Clarke County murder. When Deputy Kenney advised Ashley that he should discuss the Clarke County murder with the Clarke County authorities, Ashley stated that he wanted to sleep on it.

Deputy Kenney testified that twice the next day, May 10, 1989, unidentified jail personnel forwarded messages that Ashley wished to talk further. Deputy Kenney did speak with Ashley on both of these occasions, advising him of his Miranda rights each time. In the course of the second discussion on May 10, Ashley indicated that he wished to speak with the Clarke County police, who were then summoned to the Barrow County jail. Thereafter followed statements to the

Clarke County police which Ashley sought to suppress in the relevant pre-trial hearings.

In its order of November 30, 1990, the trial court held that Ashley initiated further communication with the police and waived the right to counsel which he had only moments before asserted, finding that the facts of this case are controlled by Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983).

REASONS FOR GRANTING WRIT

FIRST QUESTION PRESENTED

JOHNNY ALLEN ASHLEY'S RESUMPTION OF CONVERSATION WITH DEPUTY KENNEY, BEFORE DEPUTY KENNEY COULD COMMENCE ANY INTERROGATION, MUST BE SEEN AS SELF-INITIATED DIALOGUE RESULTING IN A WAIVER OF THE PREVIOUSLY ASSERTED RIGHT TO

COUNSEL WITHOUT REGARD TO THE PROPRIETY OF DEPUTY KENNEY'S INTENT TO QUESTION.

The trial court found as a matter of fact that Johnny Allen Ashley initiated the communication with deputy Kenney after invoking his right to counsel with the Clarke County police officers and as a matter of law that the communication initiated by Ashley led to a waiver of his previously asserted right to counsel as governed by this Court's decision in Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983). The Supreme Court of Georgia did not take specific exception to the trial court's findings of fact. The Supreme Court of Georgia found that deputy Kenney was barred from further questioning of Ashley by virtue of Ashley's invocation of his right to counsel when questioned by the Clarke County officers. From the fact

that Deputy Kenney would not have been authorized to conduct a further interrogation of Ashley, the Supreme Court of Georgia concluded that Ashley did not initiate further dialogue with the authorities as a matter of law: "[t]o hold otherwise . . . . [t]he police could cease the interrogation, leave the room, re-enter with the intent of further interrogation, and hope that the accused speaks first." (App. 8-9). The State of Georgia respectfully submits that the Supreme Court of Georgia has seriously misconstrued the controlling authority of this Court.

The first problem with the analysis employed by the Supreme Court of Georgia in this case is its confusion of Fifth and Sixth Amendment issues. The authority cited by the Supreme Court of Georgia is

its own decision in Roper v. State, 258 Ga. 847, 375 S.E.2d 600 (1989), which is predicated on this Court's ruling in Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404 (1986). Both Roper and Jackson, supra, are cases involving the Sixth Amendment right to counsel. As this Court has held recently, the invocation of the Sixth Amendment right to counsel is "offense-specific". McNeil v. Wisconsin, ____ U.S. ____, 111 S.Ct. 2204, 2207 (1991). If this were a Sixth Amendment case the questioning of Ashley by an officer from Barrow County about unrelated charges would not have been barred by an assertion of the right to counsel with respect to other offenses. The Fifth Amendment issue regarding re-interrogation about unrelated offenses after an initial invocation of the right

to counsel is controlled by Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093 (1988). If the Supreme Court of Georgia had based this Fifth Amendment case on Fifth Amendment precedent the error in its conclusions drawn from the facts of this case might have been avoided.

Roberson, supra, is an elaboration on this Court's ruling in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), that the police may not continue or resume interrogation of a person in custody after he asserts his privilege to deal with the police only with the assistance of counsel. "[R]e-interrogation may only occur if 'the accused himself initiates further communication, exchanges, or conversations with the police.'" Roberson, supra, 108 S.Ct. at 2097 (quoting from Edwards, supra, 451 U.S. at

485, 101 S.Ct. at 1885). The Supreme Court of Georgia has decided in this case that to leave the interview room and "re-enter with the intent of further interrogation and hope that the accused speaks first" is a re-interrogation of the accused such that the immediate commencement of conversation by the accused is not "initiated" by him but is instead the product of police interrogation. 'Re-entry with the intent to interrogate' is thus the functional equivalent of interrogation for the Supreme Court of Georgia.

With respect to interrogation and it's functional equivalent, this Court has decided that "since the police surely cannot be held accountable for the unforeseeable results of their words and actions, the definition of interrogation

can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 302-303, 100 S.Ct. 1682, 1690 (1980). Indeed, it is "the preceptions of the suspect, rather than the intent of the police" which establish whether or not police conduct is the functional equivalent of interrogation. Id. at 301, 100 S.Ct. at 1689-1690; accord, Illinois v. Perkins, ____ U.S. ____, 110 S.Ct. 2394 (1990). "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns." Id. at ____, 110 S.Ct. at 2397. Petitioner suggests that if an "intent to interrogate"

accompanied by deliberate trickery and deceit does not constitute proscribed interrogation of a person in custody, then an "intent to interrogate" accompanied by nothing more than an opportunity to speak cannot amount to interrogation either.

The decision of the Supreme Court of Georgia has obvious importance to the merits of the instant case since it results in a murderer being set free. More significant, however, is the fact that this decision makes an inquiry into the intent of law enforcement officers dispositive regarding application of an exclusionary rule fashioned by this Court where this Court has held that such intent is irrelevant. The Supreme Court of Georgia has not undertaken to establish an independent state rule on this subject but has instead warped the rule set by this

Court. It is this serious misapplication of this Court's rule which Petitioner asks to be corrected.

SECOND QUESTION PRESENTED

HEARSAY EVIDENCE SHOULD BE ADMISSIBLE ON THE TRIAL COURT'S PRELIMINARY DETERMINATION OF FACT AT TO WHETHER OR NOT A PRISONER HAD SUMMONED AN INVESTIGATING OFFICER FOR THE PURPOSES OF SPEAKING WITH THAT OFFICER.

The trial court found in this case, based on deputy Kenney's testimony, that Kenney had been summoned twice by unidentified jail personnel to speak with Ashley at Ashley's request. (App. 13-14, 18). Without elaboration or citation of authority, the Supreme Court of Georgia found that such "hearsay" was inadmissible on the issue of whether or not Ashley summoned Kenney for further conversation.

(App. 9-10). There is no way to determine whether the Supreme Court of Georgia based this ruling on state law or whether its holding was considered necessary on the controlling authority of this Court. This Court has decided, however, that absent a "plain statement" that such a ruling is based on "adequate and independent state grounds," it will be presumed that that ruling rests on federal law. Illinois v. Rodriquez, _____ U.S. _____, 110 S.Ct. 2793, 2798 (1990)(quoting from Michigan v. Long, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476). The State submits that the admissibility of this evidence is a proper matter for this Court's decision.

In United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974), it was decided that hearsay evidence can be received, and in that case should have been received,

"in proceedings where the judge himself is considering the admissiblity of evidence." Id. at 175, 94 S.Ct. at 995. Matlock dealt with a Fourth Amendment admissiblity issue. In Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987), hearsay was held to be admissible in making the preliminary factual determination concerning the existence of a conspiracy for the purpose of admitting the statements of co-conspirators. In common with these and other preliminary matters of proof, the State need prove a waiver of the rights guaranteed by Miranda only by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 522 (1986).

In this case, the principal witnesses to the events in question, deputy Kenney and Ashley himself, gave testimony to the

trial court. Absent from court were the unidentified custodial officers who passed messages to Kenney that Ashley wanted to talk. Whether or not Ashley did want to speak with Kenney was a factual matter about which both Kenney and Ashley could give non-hearsay testimony. It might be preferable to produce the messenger in such a case, but it requires no great imagination to preceive how the carriers of such messages can escape documentation. The messengers in this instance are not wholly anonymous. There is no risk that the source of the message could be a stranger to the situation whose reporting of events was unworthy of belief. If Ashley had wished to speak with Kenney, the fact of his custody dictated that sending word through a jailer was a reasonable and likely means of making his

desire known. Rejecting the hearsay of the message in this case raises serious problems for police investigators in dealing with prisoners who want to communicate with them after requesting legal counsel.

Dismissing the messages in this case as hearsay places a limitation on both prisoners who have asked for lawyers and the police which the several rulings by this Court may not have anticipated. It follows necessarily from incarceration that prisoners cannot easily communicate with investigating officers directly. Messages must be passed by some medium that leaves open, at least theoretically, the question of the authenticity of the message. A letter or even a telephone call would make handwriting and voice identification an issue. If the police

must be prepared to demonstrate regoriously the authenticity of such a message before a resulting interview can be admissible, then the police will not be able to act on most such requests for attention by prisoners, for it must be anticipated that an accused may later deny that he initiated the relevant contact with the police. Such a rule might enhance the protection of a prisoner against harassing police conduct, but it would also effectively preclude the prisoner from exercising an intelligent decision to communicate with investigators.

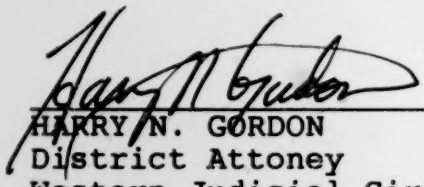
In this case, as in many others, a closer attention to detail by deputy Kenney might have avoided the present predicament. The nature of communications from prisoners, however, makes this type

of problem almost inevitable. What does an officer do if he receives "word" that a prisoner, who has requested an attorney, wants to talk? Should a trial court not be able to consider the testimony of the officer that he received such a message from a reasonably reliable source on the issue of who initiated the communication process? The State of Georgia respectfully submits that a rule excluding such evidence as hearsay is not required in preliminary factual determinations regarding admissibility of custodial statements and that this rule unnecessarily inhibits both legitimate police conduct and the rights of prisoners to make intelligent choices about dealing with the police.

CONCLUSION

For the above and foregoing reasons the decision of the Supreme Court of Georgia should be reversed.

Respectfully submitted,



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APPENDIX

In the Supreme Court of Georgia

Decided: July 3, 1991

S91A0680. Ashley v. The State

Smith, Presiding Justice:

The appellant, Johnny Allen Ashley, appeals the admission of statements he made after requesting an attorney.[1] We reverse and remand for a new trial.

---

[1]. The crime was committed on May 5, 1989. On December 4, 1990, appellant filed a motion to suppress certain statements made by him to the police on the basis of an alleged violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. The motion was denied. On December 5, 1990, appellant withdrew his not-guilty plea and entered a guilty plea to Count two only (felony murder), reserving the right to appeal the order admitting his custodial statements. The State entered an order of nolle prosequi on the grounds that further prosecution of the Malice Murder and Armed Robbery was not in the interest of justice. The record was docketed in this Court on February 20, 1991. The case was argued on April 16, 1991.

A robbery and murder was committed in Clarke County on May 5, 1989. The appellant was a suspect, and Clarke County authorities assisted by Barrow County deputies executed a search warrant on the appellant's Barrow County home. Shortly thereafter, the authorities spotted the appellant driving by and followed his car briefly before pulling him over. He was detained on suspicion of DUI, and was later arrested for unlawful use of a license plate, obstruction, and possession of controlled substances that were found in the earlier search of his home. Approximately two hours later, Clarke County investigators transported the appellant to Clarke County to interrogate him on suspicion of homicide and robbery. The appellant was given Miranda warnings en route and upon questioning.

The appellant denied any involvement in the murder. The Clarke County detectives then transported the appellant back to the Barrow County jail, but returned the next day, May 9, with a warrant to obtain hair and blood samples. After the samples were taken, the Clarke County detectives returned the appellant to the Barrow County Jail and questioned him again. The questioning by the Clarke County detectives ended when the appellant requested an attorney, but after they left the interrogation room the Barrow County officer who had been in and out returned to the room to "interview him" regarding the possession charge. The Barrow County officer claims he was not in the room when the appellant made his request for counsel, although this is contradicted by the testimony of the Clarke County officer.

During the Jackson-Denno hearing the appellant testified that as soon as the officer walked into the room he asked the officer what he was charged with. The officer testified that he re-entered the interrogation room to interview the appellant and stated that, "I talked to him about the drugs; later on, we got around to the murder charge."

The State contends and the appellant disputes that on May 10, 1989 the appellant informed a jailer that he wanted to speak with the Barrow County investigator. After receiving Miranda warnings a brief conversation ensued, and the appellant said he wanted to think about it some more. Two hours later the appellant again was brought to see the investigator. This time Clarke County officers were contacted and they

Mirandized and interviewed the appellant. At this time the appellant recounted his knowledge of the murder. The appellant was then transported to Clarke County, advised of his rights, and while there he retold his account of the murder on videotape. A Clarke County officer reviewed the tape and attempted to further question the appellant. The appellant again requested an attorney and the interview ended.

1. The appellant asserts that the trial court erred in finding that he initiated further communication with the Barrow County officer after his request for an attorney, and in allowing into evidence the statements he made after his request for counsel.

In Roper v. State, 258 Ga. 847, 850 (375 SE2d 600) (1989) (U.S. Cert. denied 110 SC 290), we stated:

> The U.S. Supreme Court imposed upon law enforcement authorities the duty to maintain a procedure to enable an officer who proposes to initiate an interrogation to determine whether a suspect has previously invoked the right to counsel. . . . "One set of state actors. . . may not claim ignorance of defendants' unequivocal request for counsel to another state actor. . . ."

Here, the appellant clearly requested counsel and the Clarke County officials properly stopped their interrogation. Barrow County law enforcement authorities, however, failed to maintain a procedure to

enable their officer to determine whether the suspect had previously invoked his right. The Barrow County officer's testimony established that his only purpose for re-entering the interrogation room was to interrogate the appellant. This Court held in Roper, supra at 849:

> Under the rule of Edwards v. Arizona, supra, and Michigan v. Jackson, supra, once an accused in custody invokes the right to counsel, he should not be subject to further interrogation by the authorities until counsel is present, unless the accused himself initiates further communication, exchanges or conversations

with the police. [Cit.]

If police initiate questioning after the invocation of the right to counsel, any uncounseled waiver of that right is invalid. [Cit.]

Additionally, as Justice Powell of the United States Supreme Court stated in his concurring opinion in Edwards, "The ultimate question is whether there was a free and knowing waiver of counsel before interrogation commenced." Id. at 491. We find that the appellant's question did not "initiate" the conversation nor was there a free and voluntary waiver to the right to counsel. To hold otherwise, would cause request for counsel to be meaningless. The police could cease the interrogation, leave the room, re-enter with the intent of further interrogation,

and hope that the accused speaks first. "Such a rule would do nothing to safeguard the right of an accused to be free from uncounseled interrogation. In sum, we conclude that the "bright-line" rule of Edwards requires that counsel be present during police-initiated interrogations after an accused has invoked the right to counsel." Roper, supra, at 851.

2. The State alleges that the conversations between the appellant and investigator on May 10th, were initiated by the appellant. In support, the State proffered that the investigator was notified by unnamed jailers who said the appellant wished to talk to him. However, the jailers were never identified nor did they testify. Thus, the evidence on this matter is hearsay and inadmissible.

The essence of Edwards is to safeguard against the State's continued

interrogation of a criminally accused once that accused has requested an attorney, and to preserve the integrity of an accused's choice to communicate with the police through legal counsel. Statements made after the appellant requested counsel are inadmissible.

Judgment reversed and remanded. All the Justices concur except Bell and Hunt, JJ., who dissent to division two and to the judgment.

IN THE SUPERIOR COURT OF CLARKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA *CASE NO.SU-89-CR-0773-4
Plaintiff MOTION TO SUPPRESS
*
v.
*
JOHNNY ALLEN ASHLEY,
Defendant *
*

ORDER

The Defendant has moved to suppress certain statements made by him to the police on the basis of an alleged violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. After hearings were held on this matter on March 23, 1990 and April 17, 1990, the Court hereby enters the following order with respect thereto.

STATEMENT OF FACTS

On May 8, 1989, the Defendant, who had been arrested in Barrow County for

drug and other offenses, was transported to Clarke County for questioning as a suspect in the murder of Buddy Hall. The defendant was advised of his Miranda rights, interviewed by the Clarke County police and then transported back to Barrow County.

On May 3, 1989, officer Mike Shockley and Gary Mitchell of the Clarke County Police Department obtained a search warrant for hair and blood samples of the defendant. On the way to the Barrow County Hospital, the defendant was advised of his Miranda rights. Thereafter, he was taken to the Barrow County Sheriff's Department for interrogation. Shortly after the interview began, the defendant requested the presence of an attorney, whereupon the conversation immediately ended.

Officer Bob Kenney of the Barrow County Police Department then entered the room after Officers Mitchell and Shockley had left. The defendant asked what he had been charged with. After a brief conversation regarding the pending drug charges, the defendant hypothetically asked what would happen if he knew something about the murder. Officer Kenney then advised the defendant to talk to members of the Clarke County Police Department. The defendant stated that he wanted to think about it and the interview was thereupon concluded.

On May 10, 1989, at approximately 1:00 p.m., a jailer informed Officer Kenney that the defendant wished to talk to him. The defendant was then brought to the deputy's office at the Barrow County Jail and was there advised of his Miranda

rights. After a brief conversation, the defendant stated that he wanted to think about it some more. Approximately two hours later the defendant again sent word that he wanted to talk. At this point Officer Kenney contacted Officers Ted Ray and Mike Benner of the Clarke County Police Department; and they came to the Barrow County Jail to interview the defendant.

Officer Benner advised the defendant of his Miranda rights and the defendant narrated his knowledge of the circumstances surrounding the Hall murder. The officers then brought the defendant to the Clarke County Police Department and, after again being advised of his Miranda rights, the defendant retold his account of events relative to the Hall murder on video tape at the Clarke County Police

Department. Officer T. O. Cochran reviewed the tape and attempted to further question the defendant. The defendant then requested the presence of an attorney and the conversation ended.

CONCLUSIONS OF LAW

The defendant contends that statements made after his request for an attorney on May 9, 1989 should be suppressed as evidence because of a violation of the Edwards rule. In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the United States Supreme Court held that an accused having expressed his desire to deal with police only through counsel is not subject to further investigation until counsel has been made available unless the accused himself initiates further communication. The Court elaborated upon this rule in

Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). In Bradshaw, the Court held that the defendant, by stating to the police "Well, what is going to happen to me now?" had initiated further conversation for purposes of the Edwards rule.

The facts and circumstances at bar reveal that the defendant initiated further communication with the police after requesting a lawyer. On May 9, 1989, after the interview by Officers Mitchell and Shockley had ended, the defendant broached the subject of the investigation as soon as officer Bob Kenney entered the room. At the suppression hearing, the defendant stated the following:

> Q: When Bob Kinney (sic) came back in the room the first

thing you said is what am I charged with?

A: Well, yes sir, that is the first thing I said, yes sir.

Q: Well, Bob Kinney didn't even get a chance to ask you any questions before you asked questions:

A: No sir, he sure didn't.

Q: Sir?

A: I said no sir, he sure didn't.

Q: You started the conversation when Bob Kinney walked back in the room?

A: I ask him what I was charged with.

(Vol. II at pp. 69-70, 71).

The defendant's inquiry, "What am I charged with?" is thus factually similar to the question, "What is going to happen

to me now?" held to have initiated further communication in Bradshaw. See also, United States v. Obregon, 748 F.2d 1371 (10th Cir. 1984). Here, not only did the defendant broach the subject of the investigation to Officer Kenney on May 9, 1989, but on the following day sent word on two separate occasions that he wanted to talk. (Vol. I at 93-96). These circumstances, like in Bradshaw, evince a willingness and desire for generalized discussion about the investigation and not merely a necessary inquiry arising out of the incidence of custodial relationship. Id. at 2835. As a result, the Court finds that no violation of the Edwards rule occurred in the case at bar.

The next inquiry concerns "whether a valid waiver of the right to counsel and the right to silence had occurred, that

is, whether the purported waiver and knowing and intelligent and found to be so under the totality of circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." Edwards, supra, at 1885, n.9. This determination depends upon "'the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.'" North Carolina v. Butler, 441 U.S. 369, 374-375, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Here the Court finds no threats, promises or inducements to talk were made to the defendant, that the defendant was properly advised of his rights, and that subsequent to requesting an attorney he changed his mind and evinced a willingness and desire to talk about the investigation.

Therefore, the statements made to the police were voluntary and the result of a knowing waiver of the right to counsel and the right to silence.

WHEREFORE, based upon the preceding facts and authorities cited, the motion to suppress statements filed by the defendant is hereby denied.

So ordered, this 30th day of November, 1990.

James Barrow
Judge of the Superior
Court of Clarke County,
Georgia

SUPREME COURT OF GEORGIA

ATLANTA JULY 24, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91A0680

JOHNNY ALLEN ASHLEY V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunt, J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said Court affixed the day and year last above written.

Joline B. Williams, Clerk

CERTIFICATE OF SERVICE

I, Harry N. Gordon, hereby certify that I have served three copies of the foregoing Petition for Certiorari on Albert M. Pearson, III, counsel for Johnny Allen Ashley, at University of Georgia School of Law, Herty Drive, Athens, Georgia 30602, and three copies of the foregoing Petition for Certiorari on Legal Aid and Defender Society, counsel for Johnny Allen Ashley, at Post Office Box 1644, Athens, Georgia 30603, by depositing the same in the United States mail with proper postage affixed thereto.

This 22nd day of October, 1991.

HARRY N. GORDON
District Attorney

(2)

No. 91-686

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

JOHNNY ALLEN ASHLEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a case controlled by *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675 (1988) and *Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. 486 (1990), whether certiorari should be granted to review a decision of the Supreme Court of Georgia holding that: (1) the Respondent made an unequivocal request for counsel during a custodial interview; and (2) the state did not prove that the Respondent initiated the post-request contacts with law enforcement officials which resulted in the giving of a statement.

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BRIEF IN OPPOSITION

STATEMENT OF CASE

Respondent was arrested on May 8, 1989 on two sets of charges: (1) a murder charge which arose from an incident in Clarke County, Georgia; and (2) DUI and drug possession charges which arose in Barrow County, Georgia where the Respondent lived. At all times pertinent to this case, Respondent was in the custody of the Barrow County Sheriff's Department. The law enforcement officials of Clarke and Barrow counties acted jointly in the murder investigation and then in the arrest and interrogation of the Respondent following his arrest.

There has never been any dispute in this case that the Respondent unequivocally asserted his right to counsel in

response to an attempt to interview him during the early evening hours of May 9, 1989. When Respondent made the request for counsel, he was being interviewed by the Clarke County police who testified that Officer Kenney of the Barrow County Sheriff's Department was present and heard the request for counsel. This testimony was substantiated by the interview notes retained by one of the Clarke County officers.[1] The details about what happened next are:

1. Immediately after the Clarke County police officers departed the Barrow County jail where they had futilely attempted to interview Respondent, Kenney returned to the interview room and began to question Respondent further. The only change was a shift in the inquiry from the murder to the drug charge which was a Barrow County offense.

2. During the course of Kenney's conversation with Respondent, Kenney tried to steer the subject back to the murder. Respondent eventually broke off the discussion and said he wanted to "sleep on it" for a while.

3. The next day, May 10, 1989, Respondent was twice taken from his jail cell and brought to Kenney's

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[1] Officer Kenney admitted being present during portions of this interview but insisted that he never actually heard Ashley invoke his right to counsel. Kennedy's claim of ignorance, of course, is irrelevant to the resolution of the issue in this case. *Arizona v. Roberson*, 486 U.S. 675 (1988) (held that rule of *Edwards v. Arizona*, 451 U.S. 477 (1981) applies even when interrogation following the invocation of the right to counsel concerns a criminal matter unrelated to the initial interview and the later interviewer is ignorant of the suspect's prior request for legal assistance.)

office for a continuation of the prior evening's discussion. Respondent denied that he asked to talk to Kenney on either occasion. Kenney claimed that one of the jailers said the Respondent wanted to speak with him. Kenney, however, could not recall the name of the jailer who supposedly relayed this request and the jailer could not otherwise be identified. In addition, Kenney never asked the Respondent if he, in fact, made such a request. During the course of the second of these two meetings on May 10, 1989, Respondent agreed to talk with the Clarke County police once again and as a result made the statement that was the primary object of Respondent's motion to suppress in the trial court.

This case was argued to the Supreme Court of Georgia as a straight forward application of *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675 (1986), and *Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. 486 (1990). The argument had two components. First, Respondent argued that Kenney's interrogation on the evening of May 9, 1989 was a continuation of the interview that Respondent had attempted to conclude by invoking his right to counsel. In that light, the state's attempt to portray Kenney's interview as a separate interview which Respondent "initiated" was both contrary to fact and legally beside the point.[2] Second, the two interviews between Kenney and Respondent on May 10, 1991

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[2] Bear in mind here that the only break in the interview process on the evening of May 9, 1989 was a brief conference in the hallway outside the interview room *immediately after* Respondent told the Clarke County officers he wanted an attorney. When the conference broke up, Kenney walked back into the interview room and resumed the questioning of Respondent.

were not proven to have been at the initiative of the Respondent. In this vein, Respondent argued that under Georgia law, the hearsay rule applies to certain non-jury proceedings and ought to apply to *Jackson-Denno* hearings. For that reason, Kenney's testimony about what the unidentified jailer said was both incompetent and inadmissible to prove that Respondent initiated the May 10, 1989 meetings. Three Georgia hearsay decisions were cited in Respondent's brief to the Supreme Court of Georgia, the most notable of which was *Barnett v. State*, 194 Ga. App. 892, 392 S.E.2d 322 (1990), a case finding Georgia's hearsay rule applicable to probation revocation hearings. *See also, Mills v. Bing*, 181 Ga. App. 475, 352 S.E.2d 798 (1987); *Collins v. State*, 146 Ga. App. 857, 247 S.E.2d 602 (1978).

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

This case involved an uncomplicated application of the *Edwards, Roberson* and *Minnick* decisions to a largely undisputed set of facts. As far as the Kenney interview on the evening of May 9, 1989 is concerned, the Georgia Supreme Court simply rejected the argument that Kenney's phase of the interrogation was separate from the phase conducted by the Clarke County police officers. The Court specifically rejected the contention that Respondent initiated further discussions about the case (after having invoked his right to counsel) when he asked what the charges against him were. The Court specifically rejected the argument that by walking in and out of the

interrogation room, Kenney somehow changed the context of what was an ongoing interrogation process with only the identity of the interrogators changing.

The Georgia Supreme Court's opinion is highly fact specific and reflects a serious attempt to abide by the applicable rulings of this Court in *Edwards, Roberson* and *Minnick*. Petitioner has not shown the opinion to be in conflict with any precedent on the books in any jurisdiction – state or federal. Nor does it seem that Petitioner has made a plausible argument that the Georgia Supreme Court in fact misapplied *Edwards, Roberson* or *Minnick* despite its clear cut desire to be faithful to their command. The petition therefore does not meet the threshold guidelines to be seriously considered for certiorari review under Rule 10 of this Court's rules.

Apart from this, the Georgia Supreme Court's ruling concerning the May 10, 1989 interviews between Kenney and Respondent rested on an independent state ground – the Georgia hearsay rule. Recognizing that the state had to show that Respondent initiated those interviews, the Court found that the state had failed entirely to meet that burden. The only evidence in the record was Kenney's claim about what the unknown and unidentified jailer had told him concerning Respondent's desire to speak. Respondent denied asking for the meetings and Kenney acknowledged that he never bothered to confirm the request with Respondent when Respondent was brought into his office each time.

It is clear under this Court's independent and adequate state ground decisions that Georgia is free to apply its hearsay rule in *Jackson-Denno* hearings even though

other states and the federal courts might not choose to follow suit. *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2553-55 (1991). The Petitioner does not argue and nothing in the development of the Georgia hearsay rule suggests that its application to this case was based on the belief that federal law dictated its application. Because Georgia treats hearsay that falls outside one of the established hearsay exceptions as both inadmissible and *incompetent*, such hearsay even if erroneously admitted is not entitled to any probative weight. *Collins v. State*, 146 Ga. App. 857, 247 S.E.2d 602 (1978). Under this rationale, the hearsay rule is applicable to non-jury proceedings in Georgia at least when the question of evidentiary sufficiency is raised. In this case, the Georgia Supreme Court made it clear that *Jackson-Denno* hearings fall within this rationale. Accordingly, the Court found that the state had offered no competent evidence to support its claim that Respondent initiated the conversations with Kenney on May 10, 1989.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted

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